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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1164

ALFRED A. KNOPF, INC., ET AL., PETITIONERS

v.

WILLIAM COLBY, AS DIRECTOR OF CENTRAL INTELLIGENCE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 509 F.2d 1362. The opinion of the district court (Pet. App. 19a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1975. The petition for a writ of certiorari was filed on March 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals established a proper standard for proving whether national security information is classified under an Executive Order.

2. Whether petitioners are foreclosed by *United States* v. *Marchetti*, 466 F.2d 1309 (C.A. 4), certiorari denied, 409 U.S. 1063, from relitigating in this suit the determinations there that (a) the injunction issued in that case was not an unconstitutional prior restraint under the First Amendment; and (b) the United States was entitled to judicial enforcement of the agreement to which petitioner Marchetti subscribed when he became employed by the Central Intelligence Agency that he would not divulge classified information gained on duty without prior authorization of the Agency.

3. Whether those determinations were correct.

STATEMENT

1. *The Prior Litigation.*[1] Victor L. Marchetti was employed by the Central Intelligence Agency ("CIA")

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[1] Unless otherwise indicated, the facts in this section are taken from the opinion of the court of appeals in *United States* v. *Marchetti*, 466 F.2d 1309 (C.A. 4), certiorari denied, 409 U.S. 1063.

in various capacities from 1955 to 1969.[2] When Marchetti began work for the Agency he executed an agreement in which he promised never to divulge classified information gained on duty without prior authorization by the Agency.

In early 1972, after Marchetti attempted to publish an article dealing with the CIA without first submitting it to the Agency in breach of this agreement (App. III, p. 257, *et seq.*), the United States brought an action in the United States District Court for the Eastern District of Virginia seeking an injunction to enforce that agreement. Marchetti contended at trial that he had a First Amendment right to disclose classified information in violation of his secrecy agreement and that the United States had no right to judicial enforcement of that agreement. The district court disagreed. It enjoined Marchetti from violating his secrecy agreement through unauthorized disclosure of classified information and, to prevent inadvertent disclosure of classified information in the future, required him thereafter to submit any proposed writing pertaining to the CIA or intelligence to the Agency at least 30 days prior to submission for publication (App. I, p. 16). The court of appeals affirmed, with slight modifications, *United*

[2] From July 1968 to April 1969, he served as Executive Assistant to the Deputy Director of Central Intelligence, Admiral Rufus Taylor, the second highest officer in the Agency (App. II, p. 325). (App. references are to the Appendices in the court of appeals.) In all of his positions, Marchetti had regular access to classified information, and he often classified documents himself (App. II, pp. 319, 320, 321, 327).

States v. *Marchetti*, 466 F.2d 1309 (C.A. 4), and this Court denied certiorari, 409 U.S. 1063.

2. *The Manuscript.* In August of 1973, Marchetti and co-author John D. Marks submitted a manuscript entitled "The CIA and the Cult of Intelligence" to the Agency for review, in accordance with the injunction (App. I, p. 3). Marks is a former employee of the State Department, where he served as Special Assistant to the Director of Intelligence and Research, the chief intelligence officer of that Department (App. II, pp. 381-383). Like petitioner Marchetti, Marks had been required to, and did, execute secrecy agreements upon commencing service with the State Department (App. II, pp. 893-903).

Upon receipt of the manuscript, CIA officials conducted an extensive review to determine whether any of the information contained therein was classified (App. II, pp. 32-33). Within the 30 days provided by the injunction, the CIA advised counsel for Marchetti and Marks that 339 items of classified information identified in the manuscript should be deleted (App. II, p. 909). Marchetti and Marks, together with Alfred A. Knopf, Inc., their publisher, thereupon filed this action in the United States District Court for the Southern District of New York, seeking restoration of the items ordered deleted by the CIA. The case was subsequently transferred to the Eastern District of Virginia (App. I, p. 52).[3]

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[3] After intervention by the United States and contemporaneously with the filing of defendants' answers, the United States and defendant Kissinger counterclaimed against plain-

3. *Proceedings Below.* At the trial[4] (App. II, pp. 1-445), the federal defendants relied primarily on the testimony of the four Deputy Directors of the CIA. Each of them testified that he knew from personal experience, a review of documents, and his personal knowledge, that the items designated for deletion which came within his jurisdiction comprised information which had been, and was currently, classified (App. I, p. 111). Each Deputy Director also testified that the items in question had been classified during the employments of Marchetti and Marks, before the manuscript had been submitted to the CIA, and had never been declassified (*ibid.*). With respect to exemplary deletions, each Deputy Director further testified that the items designated for deletion contained information set forth in certain classified documents, produced by the government during discovery and introduced into evidence (App. II, pp. 434-435), each of which was stamped either TOP

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tiff Marks seeking an injunction requiring compliance with his secrecy agreements (App. I, pp. 234-259). When plaintiff Marks agreed by stipulation to be bound by the ultimate decision in this action as if he were a party to the original injunction, these counterclaims were dismissed without prejudice. Plaintiffs further agreed that, for determining the course of employment, the time periods covered by both Mr. Marchetti and Mr. Marks would both apply (App. I, p. 106).

[4] As a result of negotiations, the government eliminated a number of deletions (Pet. App. 3a), and the plaintiffs eliminated for literary reasons four items originally included (App. II, p. 410). By the time of trial, the number of deletions had been reduced to 168.

SECRET, SECRET, or CONFIDENTIAL (see *e.g.*, App. II, pp. 77-78).[5]

4. *The Decision Below.* The district court found that 26 of the 168 items designated for deletion contained classified information but that the government had not established that the remaining 142 items contain classified information (Pet. App. 6a). The court found petitioners had acquired seven of the latter items outside of their employment.

While the court recognized the potential sensitivity of the 142 items, it determined that the government had not satisfied its burden of proving that the information therein had in fact been classified. The court noted that the Deputy Directors who testified had not themselves classified the information in question, nor were they aware of who had done the classifying; and that while the documentary evidence submitted by the government (containing the same information as the deletions but masking out extraneous matter) bore classification stamps, it was nevertheless "usually impossible to determine what items of information in a document are in fact classified" (Pet. App. 24a). The district court also found, however, that none of the items designated for deletion was in the public domain because such matters as had appeared in the press or elsewhere were unauthenticated and not officially released (Pet. App. 25a).

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[5] The deleted materials related to actual intelligence operations, scientific and technological developments, and intelligence sources and methods and did not, on their face, relate to criticism of the CIA (Pet. App. 10a).

The court of appeals affirmed the district court's findings that none of the items was in the public domain and that 26 of them had been classified. It vacated the district court's finding that as to the 142 items designated for deletion the government had not proved classification and remanded to the district court for consideration pursuant to a different standard of proof.

The court held that it was sufficient for the government to show, in the absence of proof to the contrary, that "each deletion item disclosed information which was required to be classified in any degree and which was contained in a document bearing a classification stamp" (Pet. App. 11a-12a). The court noted that because the Executive Order in force when the information at issue was classified (E.O. 10501) did not require identification of the classifying officer, it was virtually impossible to supply his mental processes.*

The court also held that on remand petitioners could challenge the classifiability (that is, whether the Executive Order authorized classification) as well as the fact of classification of all the information at issue, pursuant to new amendments to the Freedom of Information Act, 5 U.S.C. 552, enacted after the

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* The court also held that in producing documentary evidence, security considerations demanded disclosure of no additional classified material beyond what was in the deletions and that the testimony of the deputy directors that the material disclosed in such documents had been, in fact, classified, was adequate (Pet. App. 12a-13a).

trial. The court declined to reconsider its holding in *United States* v. *Marchetti*, *supra*, that the First Amendment did not bar issuance of the original injunction and that the United States was entitled to judicial enforcement of its secrecy agreements with CIA employees.

ARGUMENT

1. There is no occasion for this Court to review this case in its present posture. The court of appeals has vacated the district court's finding that the government had failed to meet its burden of proving that 142 items of information were classified and has remanded for the district court to reconsider those findings under a different standard of proof. The court of appeals also remanded for the district court to consider, with respect to all 168 items, whether under the intervening amendments to the Freedom of Information Act the material in issue was classifiable under an Executive Order. Accordingly, the case is likely to be in a quite different posture after the remand proceedings have been completed. At the very least, the facts underlying the broad constitutional issues that petitioners raise will have been sharpened and focused as a result of the proceedings on remand.

2. In any event, the court of appeals applied the correct evidentiary test for determining whether particular information has been classified. The court of appeals held that the government need show only that the information was classifiable pursuant to Executive Order and was contained in a document bearing a classification stamp, and that a deputy director

of CIA confirm that the classified status has continued.

The necessity for satisfying any higher burden of proof, such as would be required by the district court, might involve the courts in delicate and inappropriate judgments about the strategic importance of additional information contained in classified documents and entail judicial examination of sensitive documents in order to ascertain the context in which the information in question appears. This is not an appropriate subject for judicial scrutiny, and certainly is not a reasonable standard for determining whether particular information contained in classified documents is itself classified. Alternatively, the district court's standard would involve an inquiry into the contemporaneous mental impressions of the officer who initially classified the documents as to how the information would have been classified had it been separate from more sensitive information in the same document. This is particularly inappropriate because the Executive Order in force when the documents were classified (No. 10501) did not require identification of the classifying officer.[7]

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[7] Marchetti began his employment with the CIA in 1955. It is therefore not surprising that the Deputy Directors who testified may not have known the precise time when a particular item was first classified, or by whom. They did, however, as the district court acknowledged, testify from personal knowledge and agency records that the material was classified during the employment of Marchetti and Marks, and the documentary evidence submitted by the government was contemporaneous with those periods of employment.

The court of appeals' standard for proof of classification reflects well-settled judicial deference to the Executive Branch of government in the area of intelligence gathering and foreign relations. As this Court stated in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the proprietary of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

See also *C. & S. Airlines* v. *Waterman Corp.*, 333 U.S. 103. Unquestionably, "[g]athering intelligence information and the other activities of the [Central Intelligence] Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces." *Marchetti, supra*, 466 F.2d at 1315.

3. The constitutional issues that petitioners raise —the propriety of enjoining petitioner Marchetti from disclosing classified intelligence information in violation of his secrecy agreement with the CIA and requiring him to submit any writings on the subject of intelligence to that agency for at least 30 days prior to publication—were all resolved against Marchetti in the prior case, *United States* v. *Marchetti*, 466 F.2d 1309 (C.A. 4), certiorari denied, 409 U.S.

1063. Petitioner Marchetti and the other petitioners, who are in privity with him, therefore are foreclosed from relitigating those issues. "[M]atters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598; see, also, *Lawlor* v. *National Screen Service*, 349 U.S. 322, 326.[8] The present case is not a continuation of the prior litigation, but is a new suit originally brought in a different court. Under settled principles of *res judicata*, petitioners cannot use the present case as a means of relitigating issues that have been put to rest in the earlier proceeding.

4. In any event, there is no more occasion for review of the constitutional issues now than there was when this Court denied certiorari in the prior case. The court of appeals properly rejected the contention that the injunction against publication of classified intelligence information in violation of Marchetti's secrecy agreement with the CIA consti-

[8] The cases petitioner cites in an attempt to avoid the consequences of the earlier judgment (Pet. 13, n. 12) are inapposite, since they involve single actions that had come to the court of appeals initially in an interlocutory posture, were subsequently finally decided by the district court and court of appeals, and then were reviewed by this Court. *United States* v. *Marchetti*, however, was an entirely independent action in which the lower courts resolved against petitioners all questions regarding the application of the First Amendment to the injunction and the entitlement of the United States to sue.

tutes a forbidden prior restraint in violation of the First Amendment, and that the United States had no right to judicial enforcement of the secrecy agreement.

a. Relying on *New York Times Co.* v. *United States*, 403 U.S. 713, petitioners maintain that they have the same right to publish classified material as the New York Times and the Washington Post and that the prior restraint imposed on them by the injunction can be justified only by showing that the "disclosure of the information sought to be restrained would 'surely result in direct, immediate, and irreparable damage to our Nation or its people' " (Pet. 22, quoting the concurring opinion of Mr. Justice Stewart in *New York Times* v. *United States*, 403 U.S. 713, 730).

New York Times Co. v. *United States*, 403 U.S. 713, is inapposite, however, since in that case the United States sought an injunction barring two newspapers from publishing information which they had obtained from specified classified documents, while the injunction in *United States* v. *Marchetti* was issued against a former employee of the United States who agreed, as a condition of his employment, not to disclose classified information which came into his possession during that employment.*

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* The injunction in the instant case does not run against Knopf, which has no confidential relationship with the government. Although its attorneys have had access to the classified material for the purpose of this litigation, Knopf has not even seen the classified material in issue because the

Regardless of the reasonableness of the contractual provision and the significant interest of the United States in maintaining the confidentiality of classified documents, petitioners contend that the restrictions which may be imposed on their freedom to publish classified information are no different from those which may be imposed on a newspaper which has no such relationship with the government. While "unreasonable" conditions may not be attached to public employment (*Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606), a public employee may be subjected to greater restraints than ordinary citizens. As the Court observed in an analogous context in *Pickering* v. *Board of Education*, 391 U.S. 563, 568, cited by petitioner (Pet. 23):

> * * * "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents, supra*, [385 U.S.] at 605-606. At the same time it cannot be gainsaid that the State has interests as an employer in regu-

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injunction against Mr. Marchetti, to which Mr. Marks has agreed to be bound, prohibited them from disclosing it. Having never seen the information, Knopf is in a far different position than the New York Times or the Washington Post in *New York Times, supra*. Its argument is that its alleged contract with Marchetti and Marks gives it a right to acquire this information which outweighs both the secrecy agreements with the government and the final injunction previously issued. Knopf, however, has no First Amendment right to publish material it does not even possess; its rights are entirely derivative of Marchetti's and Marks'.

lating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."

The Central Intelligence Agency, whose principal function necessarily touches upon the most sensitive and confidential matters bearing on the Executive's conduct of foreign policy, "has interests as an employer" that differ "significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Those interests justify the conditioning of employment on a promise by the employee not to make unauthorized disclosure of classified information which comes into his knowledge and possession during his employment. The government as an employer may enter into agreements requiring its employees to maintain the confidentiality of information they obtain as a result of their official duties and the disclosure of which would compromise the performance of important governmental

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[10] There are, of course, numerous cases in various contexts reaching a similar conclusion. *See, e.g., Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548; *United Public Workers* v. *Mitchell*, 330 U.S. 75; *Goldwasser* v. *Brown*, 417 F.2d 1169, 1176-1177 (C.A.D.C.), certiorari denied *sub nom. Goldwasser* v. *Seamans*, 397 U.S. 922. Courts have authorized injunctions against publications where important governmental interests were at stake. *Mans* v. *United States*, 371 F.2d 548 (C.A.D.C.); *United States* v. *Hunter*, 459 F.2d 205 (C.A. 4), certiorari denied, 409 U.S. 934; *see also National Labor Relations Board* v. *Giesel Packing Co.*, 395 U.S. 575, 616-620; Hoskin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. Pa. L. Rev. 271 (1971).

functions. *Cf. Totten* v. *United States*, 92 U.S. 105; *E. W. Bliss Co.* v. *United States*, 249 U.S. 37, 46. As the court of appeals stated in the earlier *Marchetti* case, 466 F.2d at 1316-1317:

> Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably imply a secrecy agreement had there been no formally expressed agreement, but it certainly lends a high degree of reasonableness to the contract in its protection of classified information from unauthorized disclosure.
>
> Moreover, the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment. One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course. * * *

b. Petitioners also argue that since Congress has never authorized extraction of the secrecy agreements in this case or suit to enforce them, the district court was without jurisdiction to entertain the original complaint. Like petitioners' First Amendment contentions, this contention was definitively rejected in the prior case.

In any event, petitioners' argument ignores 50 U.S.C. 403(d)(3), which states that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Congress obviously intended that in exercising that responsibility, the Director would prescribe reasonable requirements for protecting intelligence sources and methods from unauthorized disclosure. This authority includes the requirement that prospective employees enter into contracts agreeing not to disclose classified information coming into their possession during employment.

Under 28 U.S.C. 1345, which gives the district courts "original jurisdiction of all civil actions, suits or proceedings commenced by the United States," the district court had jurisdiction to entertain this action for specific enforcement of a contract, entered into under Congressionally derived authority. Of course, "the United States may sue to protect its interests." *Wyandotte Co.* v. *United States*, 389 U.S. 191, 201.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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